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No. 178

IN THE

Supreme Court of the United States

October Term, 1958

SS MONROSA, HER ENGINES, TACKLE, ETC., AND NAVIGAZIONE ALTA ITALIA, *Petitioners*

-versus-

CARBON BLACK EXPORT, INC., *Respondent*

ON WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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While Petitioners do not desire to unduly burden the Court with a lengthy reply brief, we feel that certain comments may be of benefit to the Court, particularly in view of the large number of cases cited for the first time by the Respondent, substantially all of which will be of no real assistance to this Court in considering the questions before it.

For convenience, we shall treat the arguments of the Respondent in the order in which they appear in Respondent's brief.

Reply to Respondent's Argument I
(Respondent's Brief, Pages 11-21)

In support of its contention that the agreement to assert the claim in Italy is void because contrary to public policy, Respondent first cites and quotes from three decisions of this Court, none of which involved anything closely approaching the present agreement to litigate claims for cargo damage in the Courts of Genoa, Italy.

In one of these cases, *The Kensington*,[1] the Court was considering not the validity of an agreement to adjudicate claims in an agreed upon forum, but rather, whether a carrier could limit its liability by printed provisions on its baggage ticket. So far as the opinion reveals, there was no question of an agreement between the parties as to the place where the claim for damage or loss to the baggage was to be made. The case deals solely with the validity of the exemptions from liability on the baggage ticket, and does not in any way purport to say that the public policy of the United States forbids agreements to litigate claims in a particular forum.

The other two decisions of this Court relied on by the Respondent, the *Morse*[2] and *Terral*[3] decisions, both involved State Statutes which compelled a foreign corporation doing business in that State to agree to waive its rights to

[1] 183 U.S. 263 (1902).

[2] 87 U.S. 445 (1874).

[3] 257 U.S. 529 (1922).

resort to the Federal Courts in return for the privilege of doing business in that State. It is easy to understand that the public policy of the United States would prohibit any such unconstitutional exactions by the various States since to approve such State Statutes would in effect give to the legislatures of the various States in many areas complete control over the jurisdiction of the Federal Courts in those States. It would in effect permit the State Legislatures to take away the jurisdiction of the United States District Courts within their boundaries.

But this attempted exaction of a State Legislature in return for the privilege of doing business in that State, an exaction which required a blanket waiver for any and all times and for any and all controversies and on any and all occasions of a corporation's rights to resort to the Federal Courts, is a far cry from the agreement made between Petitioners and Respondent with respect to this shipment of carbon black upon a single voyage of the vessel. The agreement involving this cargo relates to this carriage and this carriage alone, and does not amount to a blanket acceptance of such an agreement by Respondent for all times and as respects all controversies for all time such as was attempted by the State Legislatures in the *Morse* and *Terral* cases.

In an attempt to bolster its contention that the agreement in this case is contrary to public policy, and for the first time in this litigation, Respondent next cites cases from twenty State jurisdictions which supposedly support Respondent's contention that the agreement in this case is void as contrary to public policy.

In the cases cited from eight of the States, the decisions turn on the fact that the venue of the action is specifically

controlled by a State Statute,[4]—that is, the legislature had specifically declared the public policy of that State to require venue in a certain county and under such a situation the parties could not change it.

Four of the cases cited from the States are not in point.[5] Only six of the twenty cases cited from the various States in fact give any support to Respondent's contention,[6] and in one of these a subsequently enacted State statute setting the public policy led to the result,[7] and in still another the decisions are not uniform.[8]

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[4] Arizona, California, Idaho, Missouri, North Carolina, Oregon, Texas, and West Virginia.

[5] Arkansas—**Standard Pipe Line Co. v. Burnett,** 188 Ark. 491, 66 S.W. 2d 637 (1933)—Did not involve agreement to assert claims in specific forum but was attempt by Arkansas employee of Louisiana Corporation to agree to accept compensation benefits under Louisiana Act and waive all his rights under Arkansas law which agreement was void under Arkansas statute.

Maine—**Bartlett v. Union Mutual Fire Ins. Co.,** 46 Me. 500 (1859)—Court simply held that having failed to perform other contract provisions, defendant could not rely on the provision in contract fixing the forum.

Minnesota—**Detwiler v. Lowden,** 198 Minn. 185, 269 N.W. 367, 269 N.W. 838 (1936)—This was Federal Employer's Liability Act case and turned on fact Congress had set policy on venue of such actions.

Rhode Island—**Pepin v. Society St. Jean Babtiste,** 23 R.I. 81, 49 A. 387 (1901)—Was not an agreement as to a forum but an agreement not to resort to any court which was held void.

[6] Connecticut, New York, Illinois, Iowa, Massachusetts, and Pennsylvania.

[7] Iowa—**Field v. Eastern Building & Loan Association,** 117 Iowa 185, 90 N.W. 717 (1902).

[8] Massachusetts—See **Daley v. People's Building, Loan & Savings Association,** 178 Mass. 13, 59 N.E. 452, and **Mittenthal v. Mascagni,** 183 Mass. 19, 66 N.E. 425.

The decision from the State of Washington cited by Respondent holds that parties cannot contract to bypass administrative remedies,[9] but two other decisions of the Supreme Court of Washington clearly hold that parties can contract with respect to the place of venue or jurisdiction.[10]

In addition to the cases from the State of Washington, the Courts of the States of Alabama,[11] Montana[12] and Wisconsin[13] also hold that contracts fixing venue or jurisdiction are valid and enforceable.

The Respondent next cites thirteen cases[14] from various Federal Courts supposedly in support of its argument that the agreement here is void as contrary to public policy, when in fact only three of them had such a question before the Court for determination and held them void because contrary to public policy.[15] In all three of these cases, it does not appear that the question of the reasonableness of the agreement was ever urged or con-

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[9] **Washington Local Lines v. International Brotherhood,** 183 P. 2d 504, 28 Wash. 2d 536.

[10] **State v. Court of King County,** 61 Wash. 681, 112 Pac. 927; **McVicar v. Peters,** 11 Wash. 2d 678, 120 P. 2d 484.

[11] Alabama—**Brown v. Alabama Chemical Company,** 207 Ala. 215, 92 So. 260 (1922).

[12] Montana—**Electrical Products Consolidated v. Bodell,** 816 P. 2d 788 (1957).

[13] Wisconsin—**State Ex Rel Kuhn v. Luchsinger,** 231 Wis. 533, 286 N.W. 72, 75 (1939).

[14] Respondent's brief, pp. 17, 18, and 19.

[15] **The Edam,** 27 F. Supp. 8 (S.D. N.Y. 1938).
The Ciano, 58 F. Supp. 65 (E.D. Pa. 1944).
Gough v. Hamburg Amerikanische, 158 F. 174 (S.D. N.Y. 1907).

sidered. The other ten cases cited are either not in point or clearly distinguishable as follows:

1. *United States v. Leahy*, 148 F. 2d 462 (3 C.C.A. 1945). This involved only a question of whether the United States District Court or the United States Court of Claims had jurisdiction. Jurisdiction having been specifically granted by the Congress to the United States District Courts, in providing for the suit against the Government, the Court held that the Court of Claims in fact had no jurisdiction. No question was presented to the Court of an agreement to assert the claim in the Court of Claims by contract.

2. *United Fuel Gas Company v. Columbian Fuel Corporation*, 165 F. 2d 746 (4 C.C.A. 1948)—While the Court by dictum says that "Parties cannot by contract oust the Federal Courts of their statutory jurisdiction", in the very same sentence the Court also says "there is nothing in the contracts themselves which attempts to do this." (At page 749). The question of the validity of any such agreement in the contract, therefore, was not even before the Court for its consideration.

3. *Burt v. Isthmus*, 218 F. 2d 353 (5 C.A. 1955) —The Court's decision here was not predicated on any grounds of public policy but on the ground that it would be unreasonable to compel the plaintiff to litigate the matter in Mexico as provided by the contract, particularly since one of the most important, if not the basic issue in the lawsuit, was whether or not the negotiations between the plaintiff and the defendant in fact culminated in the contract which

contained the agreement to litigate matters in the Courts of Mexico. Thus, the very existence of the contract in which the agreement was made was a basic issue in the action, and this, together with the unreasonableness of the agreement, was the primary basis on which the Court of Appeals for the Fifth Circuit declined to enforce the agreement.

4. *Columbia Casualty Company v. T. E. Mahaney*, 229 F. 2d 848 (5 C.A. 1956)—This case was cited by Respondent either in error or in an attempt to cite more cases than it thought the Court or Petitioner's counsel could read, for this case does not even remotely touch the Respondent's contention. This was a case by a plaintiff seeking a recovery under a voluntary compensation policy, and the sole claim made by the defendant at the time was that the policy had been voided by the plaintiff's suit for attorneys fees and interest in addition to compensation benefits. The Court simply held that the plaintiff had sued for voluntary compensation benefits and it was up to the Court to set the amount thereof. Nothing whatsoever in this case is in any way related to an agreement as to venue or jurisdiction.

5. *Akerly v. New York Central Railroad Company*, 168 F. 2d 812 (6 C.C.A. 1948)—This was a Federal Employer's Liability Act case in which a railroad worker had agreed in return for some advances to litigate his claim only in one of the possible forums provided by the Congress. The Court held that Congress having fixed the venue for such actions in one of several places, the Railroad worker could not by contract agree to a specific venue.

6. *The Neck*, 138 Fed. 144 (N.D. Wash., 1905).—This case involved an American seaman who had signed on board a German vessel. He sued for certain wages allegedly due and the defendant shipowner contended that a treaty requiring the adjudication of claims between a seaman and the shipowner before a German Consul required the dismissal of the action. The Court declined to dismiss the action, holding that the Plaintiff was not a member of the crew within the meaning of the treaty, so that in fact the controversy was not one between the Captain and a member of the crew as required by the treaty. The case did not involve an agreement between the plaintiff and the defendant with respect to a forum for the resolution of their differences.

7. *The Falls of Keltie*, 114 Fed. 357 (N.D. Wash., 1902)—This suit was by a seaman on a British vessel seeking an interpretation as to the period of time required to continue in the service of the vessel. There was nothing at all in the shipping articles which indicated that any such disputes had to be submitted to any particular forum. The case simply does not involve a question related to the present case.

8. *Jefferson Insurance Company v. Cia. Colonial de Navegacao, et al.*, 121 F. Supp. 828 (S.D. N.Y. 1954)—This case involved a motion of the defendant steamship company to decline jurisdiction because of the bill of lading provision providing for suit in Portugal. The Court simply held that no injustice would result by retaining the suit in New York and so far as the opinion shows, there was no showing at all that the agreement in the bill of lading was a reasonable one with respect to that particular shipment.

9. *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469 (S.D. N.Y. 1950)—This suit involved a controversy between an American citizen and a Brazilian corporation with respect to an employment contract. Contract was to be performed in South America but apparently there was no clause in the contract requiring that any actions arising out of it be asserted in South America. The motion of the defendant related only to the doctrine of forum non conveniens and did not involve a contractual agreement between the parties with respect to the place of litigation. The Court did recognize the right of an American court to decline to accept jurisdiction when to do so would offend traditional notions of fair play and substantial justice.

10. SS JOHN GORTHON, 1949 A.M.C. 1158 (E.D. La., 1949)—While this case involved a clause in a bill of lading providing for litigation in a foreign country, the Court's decision does not in fact reveal the basis on which the motion to decline jurisdiction was denied. All the Court did in its opinion was to quote the contentions of the libellant and the respondent and on what basis the Court declined to enforce the agreement in the bill of lading is nowhere indicated in the opinion. It is thus of no assistance to us here.

Thus, Respondent persists in its present brief in the same basic error made by the Court of Appeals for the Fifth Circuit, it treats the agreement of the parties as one ousting the Court of jurisdiction. It is not in fact such an agreement, but rather is one in which the basic jurisdiction of both the United States and Italy is recognized but in which the parties by contract have agreed that one forum will determine any controveries between them.

As such, it is not unlike the agreement of an automobile driver to subject himself to the jurisdiction of the Courts of a State other than his residence in which he operates his automobile. In both his home state and the other state, the Courts have jurisdiction, but by agreement, that is by operating his automobile on the highways of another state, the citizen agrees that actions arising out of his use of that automobile may be litigated in the other state, as well as in his home state.[16]

That the agreement in this case did not oust the District Court of jurisdiction is obvious in view of the bond required by the District Court to protect Respondent's security which still remains on file and in full force and effect. It can only be terminated upon the final adjudication of the suit filed by Respondent in Genoa, Italy, the agreed upon forum. (R. 37).

Reply to Respondent's Argument II
(Respondent's Brief, Pages 21-25)

Respondent's argument here is in fact simply the contention that the agreement in the bill of lading is invalid since it lessens the carrier's liability which admittedly would be in violation of the Carriage of Goods by Sea Act.

The two decisions of this Court relied on by the Respondent, the *Boyd*[17] and *Wilko*[18] cases, are clearly distinguishable, for both of those cases involved statutes in which Congress had made specific provision with respect to jurisdiction and venue. The Court in both cases simply

[16] **Hess v. Pawloski**, 274 U.S. 352 (1927).

[17] 338 U.S. 263 (1949).

[18] 346 U.S. 427 (1953).

held that Congress having fixed venue or jurisdiction, the parties could not contract it away. Of course, in the present case there is no expression from Congress at all with respect to venue or jurisdiction under the Carriage of Goods by Sea Act. The legislative history of the Carriage of Goods by Sea Act indicates clearly that Congress was aware of provisions relating to venue and jurisdiction in the Australian and Canadian Carriage of Goods by Sea Acts, but did not include in the United States Carriage of Goods by Sea Act any provision at all with respect to venue or jurisdiction.[19] As the Court of Appeals for the Second Circuit indicated in the *Muller* case, had Congress intended to invalidate such agreements it would have done so not by implication but in a forthright manner.[20]

Respondent expresses concern that if the agreement in this bill of lading is upheld, that a shipowner could so word its bill of lading as to ultimately leave American shippers or consignees without any redress for loss or damage to cargo.[21] This concern, of course, is without foundation, for this is the reason behind the requirement that such clauses as this be reasonable, and unless determined to be reasonable under the facts of a particular case, not enforceable. Respondent here in effect is concerned that American Courts will abdicate their judicial function and hold any such clause in a bill of lading to be enforceable without regard to the reasonableness of the forum. It is in fact an unfounded fear and an affront to the integrity of the American Judiciary. For this fear to be realized, we have to assume that American Courts

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[19] See footnotes 14 and 14a, page 17 of Petitioners' original brief.

[20] 224 F. 2d 806, at page 807, cert. denied 350 U.S. 903 (1955).

[21] Page 24, Respondent's Brief.

will not properly perform their judicial function. While Respondent obviously believes such an assumption is warranted, Petitioners, although foreigners, do not.

While Respondent would like to have this Court think that if it upholds the present agreement to litigate claims for this particular damaged cargo in Italy, it would be a blanket approval of all such clauses, this case involves, and the Petitioners seek, only a determination that such an agreement as this is valid if reasonable as it applies to each particular case.

But Respondent's real fears in this case apparently are pinpointed in its concern about the possible loss of a $1,000 claim, even though meritorious, because it would not be economically feasible to transport witnesses abroad.[21a] This presupposes that the shipowner is going to deny an otherwise meritorious claim simply because in dollars and cents it is small. The steamship business is one of the most competitive in the world today and it is this sharp blade of competition which will prevent any such results. But is it not a double-edged sword that cuts both ways? If an unscrupulous shipower would deny a meritorious $1,000 claim simply because the cargo owner could not afford to prosecute the action abroad, if the shoe were on the other foot, would not an equally unscrupulous cargo owner make such a jurisdictional agreement and then proceed to file a wholly unmeritorious claim for $1,000 in its own forum and attempt to force the foreign shipowners to honor that fraudulent claim simply because it would not be economically feasible for the foreign vessel owner to transport its witnesses to this country for a defense of it?

[21a] Page 24, Respondent's Brief.

Surely the law and the decision in this case must rest on something more than Respondent's fear that a foreign shipower is going to avoid its legal responsibilities under the contract of carriage. The law does not assume that someone will so avoid his legal obligations, in fact, the law assumes exactly the contrary.

Precisely the same contention, that such a clause was invalid because it lessens the carrier's liability, was made by the same attorneys who appear of counsel for the Respondent in this case in the *Muller* case, and it was expressly rejected by the Court of Appeals for the Second Circuit.[22]

Nor will Respondent's contention that the agreement in the bills of lading is a unilateral one and one which it had no choice but to accept withstand even casual scrutiny.[23] This contention could, of course, be argued with respect to each and every clause contained in the bills of lading, but, in fact, there was nothing whatsoever to compel Respondent to ship its cargo aboard this vessel or to prevent it from requesting that this clause be eliminated or changed. At least one wholly American-owned steamship company, Lykes Bros. Steamship Co., Inc., operates regular routes to these same ports in Italy with vessels departing each two weeks (R. 30-31). Almost without exception the vessels assigned to these regular routes to Italy call in both Houston and New Orleans for the receipt of cargo on each and every voyage as they pursue their liner service. Had Respondent really

[22] 224 F. 2d 806, cert. denied 350 U.S. 903 (1955).

[23] Page 25, Respondent's Brief.

been concerned about having to assert any claim it might have for cargo damage in an American Court, rather than in the Italian Courts as it agreed to do, there was certainly nothing to prevent it from arranging transportation on an American-owned vessel. Why then at this stage of the proceeding, with such a choice available to Respondent before it contracted, should Petitioners be required to defend Respondent's action for cargo damages at a patently inconvenient forum for the trial of the issues in this cause. The agreement was not forced upon Respondent against its will, but in fact was accepted without question when Respondent had readily available to it vessels that would have given Respondent the forum it now seeks.

Reply to Respondent's Argument III
(Respondent's Brief, Pages 25-34)

Respondent has finally been able to bring itself to openly contend that the agreement contained in the bill of lading is unreasonable. It is interesting to note that the case proceeded through the District Court and the Court of Appeals and through an application for a writ of certiorari before this Court before Respondent was ever able to bring itself to making such a statement. This alone indicates that even Respondent realized not only that the agreement was reasonable but that the decision of the District Court below that the agreement was not an unreasonable one in fact could not be seriously questioned.

On this phase of the matter, the question clearly is whether or not the District Court's finding was a clear abuse of discretion or clearly erroneous.[23a]

[23a] **McAllister v. United States**, 348 U.S. 19 (1954).

Even the Court of Appeals below would not go so far as to say that the District Court had abused its discretion or that its finding of the reasonableness of the agreement was clearly erroneous, but based its reversal on the grounds that the agreement was contrary to public policy and did not extend to *in rem* proceedings.

While most of Respondent's contentions in this phase of its brief are fully answered in Petitioner's brief,[24] a few comments seem appropriate here.

Respondent's brief would leave this Court with the impression that all Petitioners would have to do to establish the seaworthiness of the vessel would be to offer testimony of witnesses available in Houston and New Orleans since the cargo was loaded there.[25] In truth and in fact substantially all of the most persuasive evidence will be available only from witnesses and records who are readily available only in Italy. It is significant to note that the Carriage of Goods by Sea Act provides that "the carrier shall be bound, *before* and at the beginning of the voyage to exercise due diligence"[26] to make the vessel seaworthy.

Respondent contends that the beginning of the voyage was at Houston and New Orleans and implies that the burden of showing diligence to make the vessel seaworthy relates only to those two ports. While not admitting that Respondent is correct and that the beginning of the voyage in a situation such as this did not occur when the vessel left Italy on its outward leg of the voyage, Petitioners are willing to assume for the sake of argument

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[24] Pages 21 through 22 (footnote 19).

[25] Respondent's Brief, pages 27, 28.

[26] 46 U.S.C.A. #1303(1)(a) (Emphasis supplied).

that the voyage began at Houston and New Orleans as spondent contends. Even so, the Carriage of Goods by Sea requires that the diligence of the shipowner must be sho *before* and at the beginning of the voyage. Thus, burden is clearly upon the vessel owner to show dilige not only at New Orleans and Houston to make the ve seaworthy, but in fact prior to the commencement of voyage from its home port in Italy. Certainly Petitior would be delighted if on a trial their burden to sh diligence to make the vessel seaworthy was limited o to the proof of their actions in the Ports of New Orle and Houston, but we are confident that Respondent's a counsel would never overlook the requirement of Carriage of Goods by Sea Act that the owner's duty use diligence to make the vessel seaworthy exists *before* well as *at* the beginning of the voyage. This being Italian vessel with its home port in Italy, all of its perio inspections by the vessel's owner and surveys made connection therewith were made in Italy and all reco relating to the condition of the vessel are in Italy. To charge its burden of showing diligence to make the ve seaworthy, Petitioners undoubtedly will have to offer tailed evidence not only from the vessel owner's own p sonnel in Italy, but from the vessel's crew who reside Italy, from Italian surveyors who reside in Italy, and fr one or more shipyards and their records in Italy.

The burden of showing the vessel owner's diligence make the vessel seaworthy before and at the beginning the voyage is not simply a question of presenting a w ness or two from Houston or New Orleans as Respond implies. Substantially all of the most material and re vant evidence on this crucial issue will come not fr

witnesses in Houston and New Orleans, but rather from witnesses and documentary evidence which is readily available only in the agreed upon forum, in Italy.

We fail to see the relevance of Respondent's contention that this agreement should not be enforced because the Italian law prohibits such agreements.[28] The fact that the public policy of Italy has been specifically declared against such agreements apparently by an appropriate legislative body, does not mean that the public policy of the United States is the same without a legislative mandate. It does emphasize very strongly that with Congress not having made such a provision for exclusive jurisdiction in the United States, that it is a matter for the Congress to legislate on. Certainly no contention is made by Petitioners here that had Congress provided that such agreements were void, that the clause would be enforceable. The fact that it is specifically covered by an appropriate legislative enactment in Italy is of no significance here where we have no legislative enactment at all by the Congress except to the extent that the Italian legislation indicates clearly that it is a matter for the Congress and not for the Courts.

When Respondent's argument is considered on the question of the reasonableness of the agreement, it boils down to nothing more than the fact that there are some facts in this case which are different from the cases relied upon by Petitioners from the Court of Appeals for the Second Circuit. The question is not whether there are some

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[28] Respondent's brief, page 29.

different facts involved, but whether or not the Italian forum is a reasonable or convenient one. The facts indicate overwhelmingly that the forum in Italy is not only reasonable but is in fact the only convenient forum for litigation of the issues in this case. The most that can be said for Respondent's argument is that some of the proof will have to be obtained in the United States, but the vast majority of it with respect to the seaworthiness of the vessel and the nature, extent and amount of the damages which Respondent is entitled to receive if the vessel is liable will have to be, and can only be, obtained in Italy. Even Respondent's own witnesses on the nature, extent and amount of damages are in Italy. These are the crucial issues in the case, and the fact that the Courts of Genoa, Italy would be the most convenient forum in which to litigate such issues could be seen prior to the loading of the cargo when the agreement was made as readily as it can be seen now that damage has occurred.

Reply to Respondent's Argument IV
(Respondent's Brief, Pages 34-43)

Only a brief reply is indicated to Respondent's contention that if the agreement controls the *in personam* action, it does not include *in rem* actions against the vessel since Respondent has a maritime lien against the vessel for its loss and the vessel is a separate person from the owner. This Court has on two separate occasions branded such an argument as "like talking in riddles".

The latest such holding of this Court was in *Consumer's Import Co., Inc., et al. v. Kabushiki K. K. Zosengo, et al.*, 320 U.S. 249 (1943). This case involved the Fire Statute

which simply said "No owner shall be liable" for loss of cargo by fire on board a vessel "unless such fire is caused by the design or neglect of such owner."[29]

The cargo owners, whose cargo was damaged by fire, filed libels *in rem* against the ship and *in personam* against the charterer (which stood in the position of the owner). Cargo owners who were unable to prevail *in personam* against the vessel owner since they could show no personal negligence of the owner or its managing officers and agents, argued that since historically as owners of damaged cargo they had a maritime lien on the vessel and because the Fire Statute made no reference to an exculpation of the vessel, but merely stated that "no owner of any vessel shall be liable", it could continue its *in rem* action against the ship. This Court, rejecting this position and aptly labeling it a "riddle", said as follows:

> "Apart from this inapplicable exception the immunity granted appears on its face complete. But claimants contend that because their contracts of affreightment were signed 'for master' they became under maritime law ship's contracts, independently of any owner's contracts, and that the ship itself stands bound to the cargo though the owner may be freed. It seems unnecessary to examine the validity of the claim that apart from the statute claimants under the circumstances would have a lien on the vessel, or to review the historical development of the fiction that

[29] "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

the ship for some purposes is treated as a jural personality apart from that of its owner. If we assume that the circumstances are appropriate otherwise for such a lien as claimants assert, it only brings us to the question whether The Fire Statute cuts across it as well as other doctrines of liability and extinguishes claims against the vessel as well as against the owner.

"The provision here in controversy is Section 1 of the Act of March 3, 1851. Despite its all but a century of existence, the contention here made has never been before this Court. Sections 3 and 4 of the same Act in other circumstances provided limitations of liability, and as to them a question was considered by this Court in the City of Norwich (Place vs. Norwich & N. Y. Transp. Co.), 118 U.S. 468 (1886), stated thus: *'It is next contended that the Act of Congress does not extend to the exoneration of the ship, but only exonerates the owners by a surrender of the ship, and freight, and, therefore, that the plea of limited liability cannot be received in a proceeding in rem'. The Court rejected the contention and held that when the owners satisfied the limited obligation fixed on him by statute, owner and vessel were both discharged. The Court said that 'To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles.' The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age. . . .*

"Claimants urge that the statute as construed goes beyond any other exemption from liability for negligence allowed to a common carrier, and that it should therefore be curtailed by strict construction. We think, however, that claimants' contention would result in a frustration of the purpose of the Act."[30]

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[30] (320 U.S. 249, 252-254) (Emphasis supplied).

To permit Respondent to maintain its separate *in rem* action in Texas will as much frustrate the obvious purpose and intent of the agreement in the bill of lading as would permitting prosecution of an *in rem* action by owners of fire-damaged cargo where the shipowner had been judicially declared not negligent and not liable under The Fire Statute. While it is true that contractual provisions prepared by one party should be strictly interpreted against them, it is also true that courts will interpret contracts in such a way that they have their intended effect and reflect the obvious intention of the parties though they be inartfully worded. The interpretation of the clause for which Respondent contends would result in a frustration of its clear intent, a result which this Court declined to approve in the *Consumer's Import* case.

An interpretation that the clause covers both claims against the owner and the ship is even more clearly required where as here, Respondent has the full security to which it is entitled in the form of a corporate surety bond which fully substitutes for the vessel and also has already obtained jurisdiction *in personam* over the shipowner in the agreed upon forum. The District Court was correct in so interpreting the agreement.

District Court Order Should Be Sustained Without Regard To The Agreement

While the District Court did not rely on it, its action in declining jurisdiction is sustainable under the doctrine of forum non conveniens, without regard to the agreement. While recognizing the general principle, the precise question

was left open by this Court in *Swift & Co. Packers v. Compania Columbia Del Caribe, S.A.*,[31] when speaking through Mr. Justice Frankfurter, the Court said:[32]

> "There remains the question whether the District Court's order may be justified as an exercsie of discretion to decline jurisdiction under the doctrine of forum non conveniens. The doctrine is of long standing in admiralty, but this Court has not previously had to apply it to a suit brought by a United States citizen. Such application has been rare even in the lower federal courts. Cf. Canada Malting Co. vs. Paterson Steamships, Ltd. 285 US 413, 76 L ed 837, 52 S Ct 413; United States Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika OG Australie Line (CA2dNY) 65 F2d 392; see Braucher, The Inconvenient Federal Forum, 60 Harv L Rev 908, 920, 921 (1947); Bickel, Forum Non Conveniens in Admiralty, 35 Cornell L Quart 12, 41-47 (1949). We need not now decide the abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens. Discretion could not sustain declination in this case. Application of forum non conveniens principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners. The District Court gave no indication that it recognized such considerations. Its opinion indicates that in so far as it may have exercised discretion to decline jurisdiction it was moved to do so by its view that such jurisdiction does not exist. But, in any event, it was improper under the circumstances here shown to remit a United States

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[31] 339 U.S. 684 (1950).

[32] 339 U.S. 684, at page 697.

citizen to the courts of a foreign country without assuring the citizen that respondents would appear in those courts and that security would be given equal to what had been obtained by attachment in the District Court. The power of the District Court to give a libellant such assurance is shown by Canada Malting Co. v. Paterson Steamships, Ltd. 285 US 413, 424, 76 L ed 837, 843, 52 S Ct 413. See also The City of Agra (DC NY) 35 F. Supp 351.

While as previously indicated the District Court did not rely on its inherent power to decline jurisdiction in an admiralty case such as this,[33] both security and appearance in the agreed upon forum have been assured to Respondent here. Since the agreed upon forum is in fact the only convenient forum for the litigation of the issues in this case, and Respondent has both its security and personal jurisdiction in Italy, the District Court's action in this case should be sustained under its inherent powers in admiralty cases without regard to the agreement.

Although it did so on different grounds, the District Court reached the correct result as the record amply reflects the convenience of the forum in Italy. Thus while this Court may not agree with the reason stated by the District Court in granting the Motion, it can and should reinstate the District Court's order on the alternative ground that it was within its inherent powers in admiralty cases under the doctrine of forum non conveniens, and this should be and can be done both as to the *in personam* and *in rem* actions.

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[33] This basis for declining jurisdiction was also urged by Petitioners in their motion before the District Court. (R. 10).

Conclusion

It is therefore respectfully submitted that the judgment of the Court of Appeals below should be reversed and that of the District Court below reinstated.

Respectfully submitted,

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